Supreme Court, U.S.
FILED

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No. 96-_____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

SYSTEMS FUEL, INC. and
GENERAL MARINE TOWING COMPANY, INC.
Petitioners

V.

BOBBY LEON ALEXANDER,
Respondent

On Petition For Writ of Certiorari
To The Louisiana State Supreme Court

PETITION FOR WRIT OF CERTIORARI

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August 23, 1996

56 pp

QUESTION PRESENTED

Whether Article III §2 of the United States Constitution and the need for Uniformity of Admiralty and Maritime Law demand that the Louisiana state courts, which do not recognize the substantive doctrine of *collateral estoppel*, apply Federal Maritime law which does recognize said doctrine in a Jones Act/General Maritime action filed by a seaman in state court under the Savings to Suitors Clause, 28 U.S.C. §1333(1) (1993).

LIST OF PARTIES

The following is a list of parties to the proceeding in the Court whose judgment is sought to be reviewed:

Parties:

1. Bobby Alexander, Respondent.

2. Systems Fuel, Inc., Petitioner. Systems Fuel, Inc.'s Parent Company is Entergy, Inc. Systems Fuel, Inc., has no non-wholly owned subsidiary companies.

3. General Marine Towing Company, Inc. Petitioner. General Marine Towing Company, Inc. has no parent company and no non-wholly owned subsidiary companies.

Parent Companies:

1. Entergy, Inc. is Parent Company of Systems Fuel, Inc.

TABLE OF CONTENTS

Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv, v
Petition for Writ of Certiorari	1
Opinions and Orders Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Invoked	2
Statement of the Case	3
Reasons for Granting	6
1. Federal Maritime Substantive Law Versus State Substantive Law	7
2. The Importance of Maintaining Uniformity of Federal Maritime Law	11
3. Doctrine of "Collateral Estoppel"-Its Application as a Federal Maritime Law Substantive Right	13
4. The Doctrine of "Collateral Estoppel"-Its Application in the State Court of Louisiana	14
5. Practical Reasons Why the Doctrine of Collateral Estoppel Should Apply in the Case at Bar	15
Conclusion	16
Appendix	
Index to Appendix	ia

Table of Authorities

PAGE

Cases:

Alexander v. Systems Fuel, Inc., et al,
No. 94-CA-2497 (La. App. 4th Cir., 1995) 5

American Dredging Co. v. Miller,
114 S.Ct. 981 (1994) 11

Dart v. Ehret, 466 So.2d 1336 (La. Ct. App. 1985),
writ denied, 468 So.2d 575 (1981) 15

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 11

Fitzgerald v. United States Lines Company,
374 U.S. 16, (1963) 13,14,15

Garrett v. Moore-McCormack Co., 317 U.S. 239
(1942) 7,8,10,11

Jenkins v. Roderick, 156 F.Supp. 299
(D. Mass. 1957) 14

Kermarec v. Compagnie Generale Transatlantique,
358 U.S.625 (1959) 10,11,13,14

Madruga v. Superior Court, 346 U.S. 556 (1954) 10

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.)
304 (18)b 13

Offshore Logistics, Inc. v. Tallentire,
477 U.S. 207 (1986) 11

Pelotto v. L & N Towing Co., 604 F.2d 396
(5th Cir. 1979) 14

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406
(1953) 8,9,10,11

Red Cross v. Atlantic Fruit Co., 264 U.S. 109
(1924) 10

Runyan v. Great Lakes Dredge & Dock Co.,
141 F.2d 396, 397 (6th Cir. 1944) 14

SJ v. PM, 586 So.2d 662 (La. Ct. App. 1991) 15
Sklar v. Sklar, 387 So.2d 1308 (La. Ct. App. (1980) 15
The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866) 13
Vicknair v. Hibernia Building Corp., 479 So.2d 904 (La. 1983) 15

STATUTES:

28 U.S.C. §1257(a) (1993) 1, Appendix
28 U.S.C. §1333(1) (1993) 2
28 U.S.C. §1332 9, Appendix
46 U.S.C. §688 3, Appendix
United States Constitution Art. III, §2 12, Appendix

OTHERS:

Black's Law Dictionary, 312 (4th Ed. 1968) 15
1 STEVEN F. FRIEDELL, BENEDICT ON ADMIRALTY §105 (7th ed. Supp. 1996) 12
STORY'S COMMENTARIES ON THE CONSTITUTION, (1833) §1672 (5th ed. 1891) 12

PETITION FOR WRIT OF CERTIORARI

Systems Fuel, Inc. and General Marine Towing Company, Inc. respectfully petition for a writ of certiorari to review and reverse the judgment of the Louisiana Supreme Court.

OPINIONS AND ORDERS BELOW

The Civil District Court Parish of Orleans Reasons for Judgment (1a) is unreported. The Fourth Circuit Court of Appeal, State of Louisiana Opinion (2a) is unreported. The Civil District Court, Parish of Orleans, Judgment on Rule to Define Issues/Res Judicata and Collateral Estoppel (13a) is unreported. The Civil District Court, Parish of Orleans, Reasons for Judgment (14a) is unreported. The Fourth Circuit Court of Appeal Order (17a) is unreported. The Fourth Circuit Court of Appeal Opinion (18a) is unreported. The Louisiana State Supreme Court Order (24a) is unreported.

JURISDICTION

The Supreme Court of the State of Louisiana's opinion in this matter was entered on March 22, 1996. This Court's jurisdiction is invoked under Title 28 U.S.C. §1257(a)(1993).

It should be noted that while the Louisiana Supreme court remanded the case to the state district court for further proceedings, the determination of the federal issue in question was final.

Your petitioners would suggest that the instant case is one where summary reversal is appropriate since there is

no factual dispute and the sole issue is whether or not the federal substantive law of *collateral estoppel* should be applied by Louisiana state courts in a Jones Act and General Maritime law case instead of Louisiana civil law which does not recognize *collateral estoppel*.

Petitioners will be severely prejudiced by not being able to raise said issue again in the Louisiana State Courts since that issue has been finally decided and not subject to further review.

Furthermore, there are no more federal questions to be resolved in further proceedings at the state court level.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

1. 28 U.S.C. §1333 (1)

"The district courts shall have original jurisdiction, exclusive of the courts of the States of:

> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

2. 28 U.S.C. 1257(a). Text excerpts of 28 U.S.C. 1257(a) are in the Appendix 26a.

3. U.S. Constitution, Art. III, §2. Text excerpts of U.S. Constitution, Art. III, §2 are in the Appendix 30a.

STATEMENT OF THE CASE

Plaintiff, Bobby Alexander, filed suit in Orleans Parish Louisiana District Court against your petitioners, Systems Fuel, Inc. (hereinafter Systems Fuel) and General Marine Towing Company (hereinafter General Marine), alleging that he was injured on December 22, 1988, on a vessel owned by Systems Fuel and operated by General Marine. Plaintiff asserted claims under the Jones Act, 46 U.S.C. §688 for negligence and for unseaworthiness and maintenance and cure under the general maritime law. Petitioners filed an answer denying plaintiff's allegations, and plaintiff subsequently moved to severe the maintenance and cure claim for an expedited trial, waiving his right to a jury trial.

Trial on the maintenance and cure claim was held on April 7, 1993 with the Honorable Judge Robert Katz presiding. The pertinent findings were as follows:

1. On December 22, 1988, plaintiff, a Jones Act seaman, slipped while on board petitioners' vessel and was taken to the hospital and diagnosed with a concussion and cervical sprain.

2. On December 26, 1988, plaintiff was discharged from the hospital being neurologically intact and normal.

3. Plaintiff saw his own doctor, Robert Cooper, on December 29, 1988, complaining of headaches and sore back.

4. Plaintiff saw Dr. Cooper again on January 4, 1989, improving from his first visit with less headaches and no back soreness.

5. Dr. Cooper last saw plaintiff on January 6, 1989, at which time plaintiff had completely recovered and was released to return to work with no restrictions having reached maximum medical recovery.

6. Plaintiff returned to work on January 7, 1989, aboard petitioners' vessel and worked forty five (45) days. He reboarded the boat on March 8, 1989, and worked thirty (30) days getting off the boat on April 7, 1989.

7. At no time during the seventy five (75) days plaintiff worked on the vessel did he ever complain of pain or appear to be injured in any way.

8. Between April 7, 1989, and April 20, 1989, plaintiff injured himself at home moving furniture around the house.

9. From April 20, 1989, to the date of trial, plaintiff was treated by Dr. John Smoot and by Dr. John Frenz.

10. Petitioners paid for all medical expenses through January 6, 1989, and also paid maintenance through that date, but plaintiff did not pay for any medical treatment performed by Drs. Smoot and Frenz.[1]

Judge Katz, after considering the pleadings, the evidence, the testimony, depositions, and the law, dismissed plaintiff's petition for maintenance and cure holding that plaintiff was not entitled to any further maintenance and cure benefits (after January 6, 1989) as a result of the December 22, 1988, accident. (See Trial Court's Reasons for Judgment dated June 4, 1993 attached to the Appendix as Exhibit 1a).

Plaintiff appealed the judgment and decision of the Trial Judge. On March 29, 1995, the Louisiana Fourth Circuit Court of Appeals affirmed the Trial Judge's decision.

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[1]Factual findings 1-10 are set forth in opinions of Fourth Circuit Court of Appeals attached to the Appendix as Exhibit 2a.

The Court of Appeals, in affirming the trial judge's decision, *found that* the evidence in the record to be substantial, that plaintiff reached maximum medical recovery from the 1988 fall on January 6, 1989, and that plaintiff's subsequent complaints of pain were not related to that accident. (See Fourth Circuit opinion dated March 29, 1994 attached hereto in the Appendix as Exhibit 2a).

On August 24, 1993, plaintiff petitioned the Trial Court for a pre-trial determination of the effect of the maintenance and cure decision on the subsequent trial of negligence and unseaworthiness. On September 29, 1994, Judge Katz, applying the doctrine of *collateral estoppel*, ruled that plaintiff would not be permitted to present any evidence of lost wages incurred after January 7, 1989 (the day Plaintiff returned to full employment). Judge Katz further ruled that plaintiff would be allowed to present evidence of pain and suffering as a result of the December 22, 1988 accident, beyond January 6, 1989, but Plaintiff would not be allowed to put on additional medical testimony. (See attached Judgment on Rule to Define Issues/Res Judicata and Collateral Estopped dated September 29, 1994 attached to the Appendix as Exhibit 13a). (See also "Reasons for Judgment", attached hereto in the Appendix as Exhibit 14a dated September 29, 1994.)

Plaintiff appealed the Judgment and Decision of the Trial Judge. On November 16, 1995, the Louisiana Fourth Circuit Court of Appeal affirmed the Trial Judge's decision in the matter entitled Alexander v. Systems Fuel, Inc., et al, No. 94-CA-2497 (La. App. 4th Cir., 1995). Applying the federal maritime law doctrine of *collateral estoppel*, the Fourth Circuit found that "[t]he Judgment in plaintiff's maintenance and cure action was rendered on the same factual allegations and between the same parties as in the present action. The prior judgment held that plaintiff reached maximum medical improvement on January 6, 1989 and his subsequent complaints of pain were not the

result of his work related injury." (See Fourth Circuit Opinion dated November 16, 1995, pp. 1, 2 attached hereto in the Appendix as Exhibit 18a). "In April he injured his back at home. All subsequent medical treatment, disability and other damages resulted from this accident at home." Id.

Plaintiff applied for a writ of certiorari to the State Supreme Court of Louisiana. On March 22, 1996, in a three line opinion, the Supreme Court of the State of Louisiana granted the Writ of Certiorari and reversed the Appellate Court ruling that *collateral estoppel* did not apply to admiralty proceedings. The case was remanded to the District Court for further proceedings. (See Opinion of Louisiana State Supreme Court dated March 22, 1996, attached hereto to the Appendix as Exhibit 24a).

From this final decision which contradicted well-settled United States Supreme Court and United States Fifth Circuit Court of Appeals precedent, your petitioners apply for this writ of certiorari.

REASONS FOR GRANTING

Certiorari on this question presented for review should be granted for three (3) reasons: (1) This petition presents an important question concerning the uniformity of Federal Maritime Law as conferred by Article III, Section 2 of the United States Constitution in that the Louisiana State Supreme Court failed to apply the Federal Maritime Substantive Law Doctrine of *collateral estoppel* in a Jones Act and General Maritime Law case filed under the "savings to suitors" clause of 28 U.S.C. §1333(1) in state court in contradiction to well settled United States Supreme Court precedent; (2) The opinion of the Louisiana State Supreme Court, applying Louisiana state substantive law (civil) which does not recognize the doctrine of *collateral estoppel*, is in

direct conflict with *the prevailing law in the United States* Fifth Circuit Court of Appeals; and (3) Allowing the decision of the Louisiana Supreme Court to stand would send the wrong message, not only to the Supreme Court of Louisiana, but also to the remaining state courts who are faced with conflicts between State substantive law and Federal maritime substantive law.

1.

Federal Maritime Substantive Law Versus

State Substantive Law.

It has been well established by this Court that substantive federal maritime law rather than substantive state law will be applied in maritime cases pending in state or federal courts. In Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942), the Court reversed a Pennsylvania state court's assessment that a seaman's burden of proof (pertaining to the validity of a written release the seaman had signed) was procedural for choice of law purposes. The Court stated,

> [t]he right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in [the seaman's] cause of action. Deeply rooted in admiralty as that right is, it was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure. Such a substantive right arising from admiralty law must be enforced in a manner conforming to admiralty practice.

Id. at 243, 249.

Justice Black, writing the unanimous decision of the Court, clearly set forth why it is so important to maintain uniformity of substantive federal maritime law:

> It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try actions either under the Merchant Marine Act or in personam such as maintenance and cure. The source of the governing law applied is in the national, not the state, governments. (citation omitted) If by its practice the state court were permitted substantially to alter the right of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates.

Id. at 245. (emphasis added).

The Pennsylvania trial and appellate courts wisely heeded the Court's ruling in Garrett, as evidenced by the opinion rendered eleven years later in Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). In that case, the Supreme Court affirmed the Third Circuit Court of Appeals' decision upholding the Eastern District of Pennsylvania's ruling that Pennsylvania's state rule of contributory negligence was not applicable in a maritime tort diversity case. The plaintiff's action in Pope & Talbot was based upon a maritime tort, (citation omitted), "a type of action which the Constitution has placed under national power to control in 'its

substantive as well as its procedural features....'" Id. at 409. The Court reasoned that "[e]ven if [the plaintiff] were seeking to enforce a state-created remedy for this right, federal maritime law would be controlling." Id. The Court acknowledged that while states may sometimes supplement federal maritime law, a state may not deprive a person of any substantive admiralty rights.

Appellant's second argument in Pope & Talbot was that because this was a diversity of citizenship case under 28 U.S.C. §1332 [2], state law must govern here. In addressing that argument, this Court engaged in a discussion of the philosophy of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The Court found that plaintiff was essentially asking the Court to use the Erie-Tompkins rational to "rectify" the alleged discrepancy in applicable law depending upon in which Court a plaintiff brought suit. The Court rejected this request, which it characterized as using the Erie-Tompkins doctrine "to bring about the same kind of unfairness it was designed to end." Pope & Talbot, 346 U.S. at 411. Declining to depart from the "principle of equal justice embodied in the Erie-Tompkins doctrine", the Court stated,

> "[o]f course the substantial rights of an injured person are not to be determined differently whether his case is labelled "law side" or "admiralty side" on a District Court's docket."

Id. (citations omitted).

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[2] The Court took issue preliminarily with this issue, noting that the "complaint shows diversity of citizenship to support jurisdiction" in addition to the actual claim itself resting on a "maritime tort which under the Constitution is subject to dominant control of the Federal Government." Pope & Talbot, 346 U.S. at 409, n.4.

The Court has consistently reinforced its position as set forth in Garrett and Pope & Talbot. One year after the Pope & Talbot decision, the Court again addressed this issue in the case of Madruga v. Superior Court, 346 U.S. 556 (1954). Although Madruga dealt with the infrequently raised issue of partition and sale of a vessel, Justice Black reiterated the position of the Court in by writing the following:

> a state, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit so long as it does not attempt to make changes in the 'substantive maritime law'.

Id. at 561, citing, Red Cross v. Atlantic Fruit Co., 264 U.S. 109 (1924).

In Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959), the Court heard the issue of whether New York state law was improperly applied in a maritime tort diversity action which originated in federal court in New York. The Court stated,

> [i]f this action had been brought in a state court, reference to admiralty law would have been necessary to determine the rights and liabilities of the parties (citation omitted)...[w]here the plaintiff exercises the right conferred by diversity of citizenship to choose a federal forum, the result is no different, even though he exercises the further right to a jury trial. Whatever doubt may once have existed on that score was effectively laid to rest by Pope & Talbot v. Hawn.

Id. at 628 (citation omitted).

The line of reasoning in this area of the law so well established by this Court half a century ago in Garrett, Pope, and Kermarec, continues to be the consensus adopted by this modern Court as illustrated by Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) and American Dredging Co. v. Miller, 114 S.Ct. 981 (1994). In Tallentire, this Court stated that the

> savings to suitors clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.

Tallentire, 477 U.S. at 222-223.

Through American Dredging one sees the consistency of the Court's opinion on this issue, reiterating the strength of the principle as a basic and constant tenet of American maritime law. Although Miller primarily dealt with the question of whether the federal doctrine of *forum non conveniens* should preempt state law in admiralty cases brought in state courts, the case is important to a discussion of the issue in the case at bar because the Court confirmed the point that procedural doctrines such as *forum non conveniens* are distinguishable from such substantive doctrines as affirmative defenses. "Unlike burden of proof...and affirmative defenses such as contributory negligence...*forum non conveniens* does not bear on the substantive right to recover...." Miller, 114 S.Ct. at 988.

2.

The Importance of Maintaining

Uniformity of Federal Maritime Law

Your petitioners, at all relevant times herein, owned and/or operated towboats on the inland waterways of the United States. Your petitioners, as well as many other inland towboat companies, operate vessels on the Mississippi River and all of its tributaries. At any given time during the course of a year, towboat companies have vessels operating in or adjacent to the states of Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Wisconsin, and West Virginia and the Mississippi River and its tributaries run through all of the above states. It is, therefore, imperative that towing companies and all other litigants in Jones Act/General Maritime Law cases have the same substantive federal maritime rights in Louisiana as they would have in all of the states as mentioned above.

Each and every litigant who brings suit under the Jones Act and/or General Maritime Law should be able to expect, in any given jurisdiction -- whether federal or state -- that the same body of substantive law will apply in any jurisdiction.

The founding fathers of the United States Constitution, through U.S. Constitution Art. III, §2, granted admiralty and maritime jurisdiction to the federal government. On subjects of national interest, one of which being maritime commerce, the several states were to be prevented from making conflicting laws which could destroy "the harmony which alone could make us and keep us a nation, the United States." 1 STEVEN F. FRIEDELL, BENEDICT ON ADMIRALTY §105 (7th ed. Supp. 1996)

citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (18)b; STORY'S COMMENTARIES ON THE CONSTITUTION, (1833) §1672 (5th ed. 1891); The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866).

Today, over two hundred (200) years later, it is still critical not only that this harmony and uniformity exist, but that it prosper. Allowing the decision of the Louisiana State Supreme Court to stand would not only work an injustice upon your petitioners, but would undermine the authority and standing of this Court. Denial of this petition would send a blatant message to the Louisiana Supreme Court that it is permissible to disregard longstanding United States Supreme Court precedent without offering any explanation or rationale for so doing.

3.

Doctrine of "Collateral Estoppel"-Its Application as a Federal Maritime Law Substantive Right

This Court addressed the issue of *collateral estoppel* in Fitzgerald v. United States Lines Company, 374 U.S. 16, (1963). The Court noted

> that recovery of maintenance and cure does not bar a subsequent action under the Jones Act; (citation omitted) but of course, where such closely related claims are submitted to different triers of fact, questions of *res judicata* and *collateral estoppel* necessarily arise particularly in connection with efforts to avoid duplication of damages.

Id. at 19, n.6.

See also Kermarec, which states the general and accepted proposition that the legal rights and liabilities arising from an

injury aboard a ship in navigable waters are within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law. Kermarec, 358 U.S. at 628.

The Fifth Circuit has also followed Fitzgerald by recognizing the accepted principle that the doctrines of *res judicata* and *collateral estoppel* apply to admiralty proceedings. Pelotto v. L & N Towing Co., 604 F.2d 396 (5th Cir. 1979). Citing Fitzgerald, Runyan v. Great Lakes Dredge & Dock Co., 141 F.2d 396, 397 (6th Cir. 1944) and Jenkins v. Roderick, 156 F.Supp. 299 (D. Mass. 1957), the Fifth Circuit noted that the doctrine of *collateral estoppel* is cognizable in admiralty as a substantive federal right when it held "[i]t is true that the doctrine of *res judicata* and *collateral estoppel* apply to admiralty proceedings." Pelotto, 604 F.2d at 401.

As this Court can plainly see, the decision of the Louisiana State Supreme Court, in holding that *collateral estoppel* did not apply in Jones Act and General Maritime Law claims filed under the "savings to suitors clause" in state court, clearly contradicts the prior rulings of this Court and also is in direct conflict with the precedent in the United States Fifth Circuit Court of Appeals. There are no underlying reasons for the Louisiana Supreme Court to go against the decisions of this Court and the Fifth Circuit Court of Appeals.

4.

The Doctrine of "Collateral Estoppel"

-Its Application in the State Court of Louisiana

Louisiana State courts, applying Louisiana Civil law, do not recognize the doctrine of *collateral estoppel* as a substantive right of litigants. The State Courts of Louisiana are governed by Civil law, a

> system of jurisprudence held and administered in the Roman empire... comprising the Institutes, Code, Digest, and Novels,... as distinguished from the common law of England...

(emphasis added) Black's Law Dictionary, 312 (4th Ed. 1968).

The common-law doctrine of *collateral estoppel* does not apply in Louisiana. SJ v. PM, 586 So.2d 662 (La. Ct. App. 1991). *See also*, Vicknair v. Hibernia Building Corp., 479 So.2d 904 (La. 1983); Dart v. Ehret, 466 So.2d 1336 (La. Ct. App. 1985), writ denied, 468 So.2d 575 (1981); Sklar v. Sklar, 387 So.2d 1308 (La. Ct. App. 1980).

5.

Practical Reasons Why the Doctrine of Collateral Estoppel Should Apply in the Case at Bar

In the Fitzgerald case previously discussed, this Court recognized the practical problem involved when a seaman bifurcates his lawsuit, submitting part of it to a judge and part of it to a jury. When this occurs, the doctrines of *res judicata* and *collateral estoppel* apply, especially in the area of determining damages to findings established in the first proceeding. Fitzgerald, 374 U.S. at 18-19.

In the case at bar, it has already been found that the plaintiff worked seventy five days following his injury as a deckhand on the riverboat with no complaints of pain or no physical problems. Furthermore, he did not seek medical treatment after returning to work until after he sustained an injury at home which occurred approximately four months after he returned to work. The Trial Judge and the Appellate Courts found that plaintiff fully recovered from his

boat injury as of January 6, 1989, and that any future problems, disabilities, pain, etc. were caused by his injury at home and not caused by his injury on the boat.

If the Louisiana Court Supreme Court decision is allowed to stand, all of these prior findings which were substantial in the mind of the Trial and Appellate Court Judges will be thrown out and the plaintiff will begin anew with a jury. The plaintiff will be allowed to put on evidence and will get another bite at the apple to prove that he has sustained thousands of dollars in past lost wages and will sustain thousands of dollars in future lost wages as a result of the accident on the boat, and to prove that all of his medical expenses after January 6, 1989, should be paid by your petitioners.

Allowing the plaintiff to recover for the medical expenses incurred after his injury at home and to recover past and future lost wages, past and future pain and suffering beyond the date of his accident at home would be illogical, unjust and will act as a mockery of the judicial system. Allowing the plaintiff to proceed in district court on his claim of damages under the Jones Act with no limitations would be not only severely prejudicial and unjust to your petitioners but defy logic and the sense of fair play.

CONCLUSION

The doctrine of *collateral estoppel* is founded on the premise that facts and issues which are already decided and proven need not be re-litigated in the interest of judicial economy and fairness. It is well established that if the medical issues dealing with the maintenance and cure claim are the same issues which would decide the Jones Act and unseaworthiness claims as far as damages are concerned, then an adverse ruling on medical issues during the maintenance and cure trial would collaterally estop the

plaintiff from proceeding on those same damage issues in his Jones Act and unseaworthiness trial.

The rulings of the Trial Judge and the Louisiana Fourth Circuit Court of Appeals were based upon strong evidence and convincing exhibits. The Louisiana Fourth Circuit Court of Appeals in its November 29, 1994 opinion noted that the evidence presented to the Trial Judge was "overwhelming" that the plaintiff reached maximum medical recovery from his December 22, 1988 injury on January 6, 1989 and that any subsequent complaints of pain thereafter were the result of an injury sustained at home approximately four months after reaching maximum medical recovery and after resuming normal employment in his strenuous manual labor job.

In the instant case, the need for uniformity in the General Maritime Law is critical, and this Court has recognized that need following the grant of admiralty and maritime law jurisdiction from the United States Constitution.

The Louisiana Supreme Court offered no reason or rationale in its three sentence opinion why the federal substantive law doctrine of *collateral estoppel* should not be applied in the instant case. We can only assume that the Louisiana Supreme Court felt that Louisiana substantive law, which does not recognize the doctrine of *collateral estoppel*, should be applied without regard to United States Supreme Court and United States Fifth Circuit Court of Appeals precedent and the need for uniformity of maritime law.

Your petitioners would again request or suggest that summary reversal would be an excellent vehicle to dispose of this case. The issues and facts are plain and clear, the law compellingly in support of your petitioners' position in this case.

RESPECTFULLY SUBMITTED

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August 23, 1996

APPENDIX

INDEX TO APPENDIX

	Page
Civil District Court, Parish of Orleans- Reasons for Judgment dated June 4, 1993 Civil District Court	1a
Fourth Circuit Court of Appeal, State of Louisiana - Opinion dated March 29, 1994	2a
Civil District Court, Parish of Orleans - Judgment on Rule to Define Issues/Res Judicata and Collateral Estoppel dated September 29, 1994	13a
Civil District Court, Parish of Orleans - Reasons for Judgment dated September 29, 1994	14a
Fourth Circuit Court of Appeal - Order August 31, 1995	17a
Fourth Circuit Court of Appeal - Opinion dated November 16, 1995	18a
Louisiana State Supreme Court - Order dated March 22, 1996	24a
U.S.C. §1257(a) (1993)	26a
28 U.S.C. §1332	27a
46 U.S.C. §688	29a
U.S. Constitution, Art. III §2	30a

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 89-12824 DIVISION "B" Docket

BOBBY LEON ALEXANDER

VERSUS

SYSTEM FUELS, INC., GENERAL MARINE TOWING COMPANY, ABC INSURANCE COMPANY AND XYZ INSURANCE COMPANY

REASONS FOR JUDGMENT

The Court assigns the following reasons for judgment:

The Court finds that whatever medical problems the plaintiff is presently suffering from are not related to the December 22, 1988 incident.

Accordingly, the plaintiff is not entitled to any further maintenance and cure benefit as a result of the December 22, 1988, accident.

New Orleans, Louisiana, this 4th day of June, 1993.

/s/ ROBERT A. KATZ

JUDGE

NOT DESIGNATED FOR PUBLICATION

BOBBY LEON ALEXANDER	*	No. 93-CA-1929
VERSUS	*	COURT OF APPEAL
SYSTEMS FUEL, INC.	*	FOURTH CIRCUIT
GENERAL MARINE TOWING		
MARINE TOWING COMPANY,	*	STATE OF LOUISIANA
ABC INSURANCE COMPANY		
AND XYZ INSURANCE		
COMPANY		

* * * * * *

APPEAL FROM THE
CIVIL DISTRICT COURT, FOR THE PARISH OF ORLEANS
NO. 89-12824, DIVISION "B"
HONORABLE ROBERT A. KATZ, JUDGE

* * * * * *

PHILIP C. CIACCIO
JUDGE

* * * * *

(Court composed of Chief Judge Patrick M. Schott and Judge Phillip C. Ciaccio and Judge Bernard Armstrong)

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AFFIRMED
March 29, 1994

93CA1929.OP1

This is an appeal from the trial court's dismissal of plaintiff's claim for maintenance and cure. For the reasons stated, we affirm the trial court's judgment.

Plaintiff filed this petition for damages on June 12, 1989, alleging that he was injured while working as a Jones Act seaman aboard a vessel owned by Systems, Fuel, Inc. and operated by General Marine Towing Company. Plaintiff alleges that on December 22, 1988, he was employed by General Marine and was assigned to the position of first mate aboard the vessel M/V GLADYS R. On that date, plaintiff fell to the dock of the boat, sustaining the injuries sued upon herein.

In his petition, plaintiff named as defendants both Systems Fuel and General Marine as well as their insurers, asserting liability for negligence, unseaworthiness and maintenance and cure. Defendants filed an answer denying plaintiff's allegations, and plaintiff subsequently moved to sever the maintenance and cure claim for an expedited trial.

This matter was tried on April 7, 1993, on plaintiff's maintenance and cure claim only. Plaintiff produced no witnesses at trial, but introduced two depositions of Bobby Alexander as well as the depositions of three physicians who treated plaintiff following this accident. Plaintiff also submitted his medical bills and records to the court. Defendants produced the testimony of an employee of General Marine as well as that of Dr. Richard Levy, a neurosurgeon who reviewed plaintiff's medical records at defendant's request.

The undisputed facts reveal that on December 22, 1988, Bobby Alexander, a Jones Act seaman, slipped while on board the M/V GLADYS R and fell to the steel deck 10-12 feet below. He was brought to a hospital in New Orleans, where he remained for five days and was treated for a concussion and back injuries.

On December 29, 1988, Mr. Alexander visited Dr. Robert Cooper, a family practitioner in Oxford, Mississippi, complaining of headaches, dizziness and low back pain. Plaintiff saw Dr. Cooper again on January 4 and on January 6, 1989, and was discharged to return to work without restrictions on January 7, 1989, by Dr. Cooper. Dr. Cooper testified in his deposition that Bobby Alexander had reached maximum medical improvement as of January 6, 1989.

Mr. Alexander returned to work with General Marine on January 7, 1989, and was stationed as running first mate on the M/V GLADYS R until February 21, 1989. He reboarded the vessel on March 8, 1989, and worked as first mate and tankerman until April 7, 1989.

Darlene McLavy, the personnel manager for General Marine, testified at trial that she was responsible for handling crew changes and for setting up medical treatment for crew members injured on a vessel. She testified that General Marine had paid all of Mr. Alexander's medical bills prior to his return to work on January 7, 1989.

Ms. McLavy stated she telephoned Mr. Alexander on April 21, 1989, to inform him of a crew change for the following date. Ms. McLavy testified that Mr. Alexander told her he would not be returning to the vessel because he

had injured his back while moving things around the house. She denied telling plaintiff that if he did not return for the crew change, he would lose his job, as she stated good tankermen were scarce.

Mr. Alexander told Ms. McLavy he would phone her after he saw a doctor, but Ms. McLavy testified she did not hear from plaintiff. Rather, Ms. McLavy received a telephone call from the office of Dr. John Frenz on May 2, 1989, regarding treatment of Mr. Alexander. On behalf of General Marine, Ms. McLavy declined to pay for Dr. Frenz's charges as Mr. Alexander had told her he was injured at home.

Mr. Alexander stated in his deposition that he phoned Ms. McLavy at home and informed her that he could not return to work because of back pain that was related to the fall on the vessel. He stated that she told him not to come back to work if he did not show up for the crew change. He also testified that while working on the vessel after the injury he complained of pain to his supervisor, Butch Ryan. However, Mr. Ryan stated in his deposition that plaintiff did not complain to him of pain, but carried out his duties.

Mr. Alexander saw Dr. John Smoot on April 20, 1989, complaining of back and leg pain as a result of the accident on the boat. Upon examination, Dr. Smoot determined Mr. Alexander had sustained a severe lumbar strain and advised him to refrain from working for at least 30 days. Dr. Smoot ordered a CT Scan which revealed herniation of the disc at the L4 level and he referred Mr. Alexander to a neurologist, Dr. John Frenz.

Dr. Smoot continued to see Mr. Alexander through 1990, and ordered additional testing including another CT Scan and an MRI. The CT Scan did not show the herniated disc previously seen and the MRI showed minimal annular bulging with no nerve root impingement.

Dr. Smoot believed that in November of 1990, Mr. Alexander was disabled from returning to work on the vessel, and that the cause of the injury was the accident on the vessel based on the history given by the patient. However, Dr. Smoot stated if Mr. Alexander gave an untruthful history, this would alter his opinion.

On May 2, 1989, Dr. John Frenz, a neurologist, saw Mr. Alexander who complained of back and leg pain. Dr. Frenz received a history from Mr. Alexander relating the pain to the fall on the vessel. He diagnosed plaintiff as having lumbosacral strain, suspecting disc displacement and nerve root compression. Dr. Frenz recommended an intensive course of hospital treatment, including physical therapy, medications and undergoing a myelogram. However, Mr. Alexander was unable to undergo this treatment because his employer failed to authorize payment of the medical expenses.

Dr. Frenz continued to see plaintiff and found his symptoms were worsening due to lack of treatment. Dr. Frenz had the opportunity to review the films of an MRI test taken of plaintiff in November, 1989, at his employer's request and found the results of the test to be abnormal. Dr. Frenz saw Mr. Alexander in March of 1992 and found his condition had worsened, and that the delay in treatment had caused the worsening of his condition.

Plaintiff underwent an additional CT Scan and myelogram in April of 1992, and Dr. Frenz found abnormalities in plaintiff's neck and back which he related to plaintiff's 1988 accident on the vessel. Dr. Frenz stated that his findings were based on history given by plaintiff, and if plaintiff was untruthful, he could not give this opinion.

Two depositions of Dr. Joseph Miller were also introduced into evidence. Dr. Miller is a neurological surgeon who first examined plaintiff on September 15, 1989, but could not localize plaintiff's problem on this date and ordered an MRI test. Dr. Miller found the results of the MRI test to be normal and on November 20, 1989, he gave this report to plaintiff who told Dr. Miller he was much better. Plaintiff was discharged by Dr. Miller on that date as able to return to work.

Dr. Miller saw plaintiff again in October of 1992 complaining of neck and back pain, and stated that his neck pain was worse. However, Dr. Miller stated he reminded plaintiff that he had not complained of neck pain in the earlier examination, and plaintiff then said his back pain was worse. Plaintiff told Dr. Miller that he had been unable to work, although Dr. Miller observed callouses on plaintiff's hands which he believed indicated plaintiff had been working. Dr. Miller examined plaintiff on that date and found no abnormality or impairment, and felt the patient could return to work. Dr. Miller stated that his opinion of the plaintiff in 1992 was no different than it had been in 1989.

Dr. Miller also stated that he reviewed the plaintiff's myelogram and CT Scan which were taken in April of 1992

and found the result to be normal. Dr. Miller stated that although the tests revealed plaintiff had degenerative changes in his spine, this condition was not related to trauma or to the 1988 accident. Further, Dr. Miller reviewed the results of the testing done by Drs. Smoot and Frenz, but found no evidence of disc herniation.

Dr. Miller stated that he believed plaintiff did not suffer a disabling injury when he fell on the vessel and had received maximum recovery by January 6, 1989. Dr. Miller based his opinion on that fact that plaintiff had no pain and a normal exam on that date and went back to work on the vessel for over two months. Dr. Miller thus concluded that any later symptoms could not be related to the 1988 accident. In Dr. Miller's opinion, there was nothing wrong with plaintiff and he did not need additional medical treatment.

Defendants also introduced evidence which indicated that plaintiff was employed from September of 1990 to August of 1992. During the majority of this time, he was employed at the Thermos Company, and his supervisor at Thermos stated in deposition that plaintiff was able to perform strenuous activities at work and did not complain of or exhibit any physical inabilities.

Following trial, the court rendered judgment dismissing plaintiff's petition for maintenance and cure, assigning the following reasons for judgment:

> The Court finds that whatever medical problems the plaintiff is presently suffering from are not related back to the December 22, 1988 accident.

> Accordingly, the plaintiff is not entitled to any further maintenance and cure benefits as a result of the December 22, 1988 accident.

Plaintiff contends on appeal that the trial court erred in its application of maritime law and committed manifest error in finding that plaintiff's injuries were not related to the accident aboard the vessel.

Maintenance and cure is the obligation of an employer under general maritime law to pay certain benefits to a seaman who suffers injury or sickness while in the service of the ship. This obligation continues until the seaman reaches maximum medical cure; that is until further treatment would not improve his condition. Huff v. Compass Nav., Inc., 522 So.2d 641, 646 (La. App. 4th Cir. 1988).

In the present case, defendants paid the medical bills of Mr. Alexander through January 6, 1989, when he was discharged by Dr. Cooper as able to return to work. Dr. Cooper stated that plaintiff had reached maximum medical recovery as of this date.

The evidence also indicates that plaintiff resumed his duties on the vessel for over two months prior to indicating to anyone that he was suffering from back pain. Although plaintiff stated in his deposition that he complained to his supervisor Butch Ryan during this time, Mr. Ryan testified in his deposition that he does not remember plaintiff ever complaining. Further, Paul Fox, a co-worker of plaintiff's stated plaintiff did not complain to him when he returned to the vessel and plaintiff was able to carry out his duties as usual. The trial court apparently resolved this conflict in

testimony against plaintiff, who did not testify at trial.

Further, Darlene McLavy testified at trial that Mr. Alexander told her he injured his back moving things around the house after he got off the boat on April 7. Although Mr. Alexander denied making this statement, the trial court apparently believed the testimony of Ms. McLavy that plaintiff had been injured at home. Plaintiff failed to testify at trial, and the trial court was faced with a credibility determination which he resolved in favor of Ms. McLavy. The trial court apparently decided to credit the testimony of the witness whose demeanor he observed, and we will not disturb this credibility determination, which we find to be within the discretion of the court.

Plaintiff argues that the trial court erred in giving more weight to the testimony of Dr. Miller than to that of plaintiff's treating physicians, Dr. Smoot and Dr. Frenz. However, the record indicates the trial court was also presented with the testimony of Dr. Cooper, plaintiff's first treating physician who was chosen personally by plaintiff. Both Dr. Cooper and Dr. Miller disagreed with the findings of Dr. Frenz with regard to evidence of disc herniation. These physicians stated unequivocally that they found no objective evidence to relate to plaintiff's current complaints to the 1988 accident.

The trial court apparently chose to credit the medical testimony of these physicians which placed plaintiff's point of recovery at January 6, 1989. Although plaintiff argues on appeal that the trial court discredited the testimony of plaintiff's treating physicians, such is not the case as the court considered the testimony of Dr. Cooper, who was plaintiff's first treating physician.

We find the evidence in the record to support this determination to be overwhelming. Within two weeks of the accident, plaintiff returned to work on the vessel. He did not complain of pain again until April of 1989 when he went to Dr. Smoot. Although Dr. Smoot and Dr. Frenz found that plaintiff was disabled as a result of the 1988 accident, the evidence indicates that plaintiff was employed from September of 1990 through August of 1992 performing strenuous activities without difficulty. Further, the opinions of Dr. Smoot and Frenz were dependent upon the history given to them by plaintiff. Plaintiff did not give to these physicians the information he gave to Ms. McLavy that he injured his back at home.

Dr. Cooper unequivocally stated that plaintiff recovered from the fall on January 6, 1989. Further, the testimony of Dr. Miller, who examined plaintiff in 1989 and 1992, and reviewed all of plaintiff's medical records in the interim, is very compelling. Although we acknowledge that in maritime cases, doubts are to be resolved in favor of the seaman, we find the evidence in the record to be substantial that plaintiff reached maximum recovery from the 1988 fall on January 6, 1989, and that his subsequent complaints of pain are not related to that accident. We find no manifest error of the trial court in reached this determination.

Plaintiff contends that the trial court failed to resolve the central issues of plaintiff's maintenance and cure claim, specifically, whether defendants were responsible for plaintiff's medical bills and whether defendants should reinstate the maintenance and cure. However, the trial court clearly held that plaintiff's current medical problems were not related to the 1988 accident and that plaintiff is

not entitled to any further maintenance and cure. We find no merit in this argument.

Plaintiff also contends that the trial court erred in failing to award compensatory and punitive damages because defendants unreasonably rejected his claim for maintenance and cure. However, the record supports the trial court's determination that plaintiff had recovered from the fall on the vessel on January 6, 1989, and he received prompt and adequate medical care to this point. Under the circumstances presented, defendants were not liable for maintenance and cure beyond January 6, 1989. The rejection of plaintiff's claim for further medical treatment was not unreasonable, and plaintiff is not entitled to compensatory or punitive damages.

For the reasons stated, we find no manifest error in the ruling of the trial court. Accordingly, the judgment is affirmed.

AFFIRMED

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA
NO. 89-12824 DIVISION "B" DOCKET 4
BOBBY LEON ALEXANDER
VS.
SYSTEMS FUEL, INC., ET AL

JUDGMENT ON RULE TO DEFINE ISSUES/RES JUDICATA AND COLLATERAL ESTOPPEL

The rule to show cause why the issues for trial on the merits should not be defined and the Exceptions of Res Judicata and Collateral Estoppel were submitted for adjudication.

Representation: Charles Ward, Jr., Esq., attorney for plaintiff;Frank J. Dantone, Esq., attorney for Systems Fuel, Inc., General Marine Towing Company.

After considering the pleadings, the memoranda, and the law, and for the written reasons assigned,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff Bobby Leon Alexander at the trial on negligence and unseaworthiness is hereby permitted to present evidence on past lost wages from December 22, 1988 through January 6, 1989 and to present evidence of pain and suffering as a result of the December 22, 1988, accident but for which medical treatment was not provided beyond January 6, 1988.

New Orleans, Louisiana, this 29th day of September, 1994.

/s/ ROBERT A. KATZ

JUDGE

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 89-12824 DIVISION "B" Docket
BOBBY LEON ALEXANDER

VERSUS

SYSTEM FUELS, INC., GENERAL MARINE TOWING COMPANY, ABC INSURANCE COMPANY AND XYZ INSURANCE COMPANY

REASONS FOR JUDGMENT

The Court assigns the following reasons for judgment:

The plaintiff filed a lawsuit for maintenance and cure and damages under negligence and unseaworthiness as a result of an accident that occurred on December 22, 1988.

Exercising his right to bifurcate the claim for maintenance and cure and to seek a prompt trial on that matter, the Court tried the claim for maintenance and cure on April 7, 1993, and dismissed the plaintiff's petition.

The Court of Appeal affirmed on March 29, 1994, in the matter entitled "Alexander v. Systems Fuel, Inc.," 93 CA1929 (4th Cir.).

The plaintiff now seeks a pre-trial ruling as to what evidence is permissible on the claim for lost wages and pain and suffering.

The plaintiff cites the Fourth Circuit decision in "Robertson v. Popeye's Fried Chicken," 524 So. 2d 97 (4th Cir., 1988) for the proposition that a decision in a worker's compensation suit is not binding on a court in the tort claim by the same plaintiff. Coincidentally, that case was tried before this Court at the trial level.

In that decision the learned Chief Judge Gulotta held that the doctrine of res judicata and the law of the case were not binding in a tort trial subsequent to the worker's compensation suit primarily because the defendant in the tort suit was different from the defendant in the compensation suit. (See headnotes 1 and 2 and page 99.)

The Federal Courts have also struggled with the effect of res judicata and collateral estoppel when the claim for maintenance and cure is tried separately from the Jones Act and unseaworthiness claims. See Pelotto v. L&N Towing Company, 604 Fed. R 2d 396 (5th Cir., USCA, 1979) at footnote 7 on page 401.

In this footnote the Court cites the Supreme Court decision in "Fitzgerald v. U.S. Lines" 374 US 16 (1963): "Requiring a seaman to split up his lawsuit, submitting part of it to a jury and part to a judge, unduly complicates and confuses a trial, creates difficulties in applying doctrines of res judicata and collateral estoppel and can easily result in too much or too little recovery... This Court has held that recovery of maintenance and cure does not bar a subsequent action under the Jones Act... but of course where such closely related claims are submitted to different triers of fact, questions of re judicata and collateral estoppel necessarily arise..."

The Court of Appeal went on to say at footnote 13 on page 402 that: "In other words, while some of the elements of damages may overlap, a payment under the obligations to provide maintenance and cure, for example, will not necessarily satisfy all of the elements of damages allowable under the right to recover for unseaworthiness of the vessel."

In balancing the interests of the plaintiff in seeking damages under the theories of negligence and unseaworthiness against the interest of the defendants in not re-litigating the medical issues, the Court has attempted to reach a balance that is difficult to verbalize without first hearing the evidence. For example, the Court found that

maximum cure was reached by January 6, 1989, but that it could very well be that the plaintiff continued to experience pain and suffering beyond this date. Hence, the plaintiff may put on evidence about his pain and suffering beyond January 6, 1989, but he may not put on additional medical testimony to this effect.

Likewise, the plaintiff may put on evidence of loss wages through January 6, 1989, but may not provide any evidence of any lost wages beyond that time.

New Orleans, Louisiana, this 29th day of September, 1994.

/s/ ROBERT A. KATZ

JUDGE

BOBBY LEON ALEXANDER	No. 94-CA-2497
VERSUS	COURT OF APPEAL
SYSTEMS FUEL, INC.	FOURTH CIRCUIT
GENERAL MARINE TOWING	
MARINE TOWING COMPANY,	STATE OF LOUISIANA
ET AL	

ORDER

Two judges on the original panel have voted to reverse the judgment of the trial court. The third judge dissents. Therefore, in accordance with La. Const. art. 5, § 8(B) and the Uniform Rules of Louisiana Courts of Appeal, Rule 1-5,

IT IS ORDERED that the above-numbered and entitled case be submitted to a five-judge panel for decision on the briefs, without argument, on the 19th day of September, 1995.

IT IS FURTHER ORDERED that the parties file any additional briefs by September 19, 1995.

New Orleans, Louisiana this 31st day of August, 1995.

/s/ Chief Judge Patrick M. Schott

/s/ Judge Joan Bernard Armstrong

/s/ Judge Miriam G. Waltzer

NOT DESIGNATED FOR PUBLICATION

BOBBY LEON ALEXANDER	*	No. 93-CA-1929
VERSUS	*	COURT OF APPEAL
SYSTEMS FUEL, INC.	*	FOURTH CIRCUIT
GENERAL MARINE TOWING		
MARINE TOWING COMPANY,	*	STATE OF LOUISIANA
ABC INSURANCE COMPANY		
AND XYZ INSURANCE		
COMPANY		

* * * * * *

APPEAL FROM THE
CIVIL DISTRICT COURT, FOR THE PARISH OF ORLEANS
NO. 89-12824, DIVISION "B"
HONORABLE ROBERT A. KATZ, JUDGE

* * * * * *

PATRICK M. SCHOTT
CHIEF JUDGE

* * * * * *

(Court composed of Chief Judge Patrick M. Schott, Judge Denis A. Barry, Judge Phillip C. Ciaccio and Judge Bernard Armstrong, Judge Miriam G. Waltzer)

ARMSTRONG, J., DISSENTS WITH REASONS.

WALTZER, J., DISSENTS FOR THE REASONS ASSIGNED BY J. ARMSTRONG.

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November 16, 1995

AFFIRMED.

94CA2467.OP1

This case arose out of an accident plaintiff had while working as a seaman aboard a vessel owned by Systems Fuel, Inc. and operated by General Marine Towing Company, hereinafter referred to as appellees. This accident occurred on December 27, 1988.

Plaintiff filed suit for maintenance and cure and damages based upon negligence and unseaworthiness. On plaintiff's motion the claim for maintenance and cure was severed from the other claims. This part of the case was tried in April 1993 and came before this court on plaintiff's appeal from a judgment which dismissed his claim for maintenance and cure. The previous opinion of this court is annexed hereto and made a part of the present opinion.

As can be seen by reference to that opinion, the following are the operative facts: plaintiff was treated for the injuries he sustained in the accident and reached maximum medical improvement on January 6, 1989. All medical bills and benefits for maintenance and cure were paid through that date. He returned to work on January 7 and worked for the next three months without problems or complaints. In April he injured his back at home. All subsequent medical treatment, disability, and other damages resulted from this accident at home.

When our judgment in the maintenance and cure part of the case because final, plaintiff returned to the trial court to pursue his negligence and unseaworthiness claims.

Shortly afterward appellees filed a rule to define the issues and for a ruling on exceptions of res judicata and collateral estoppel. The trial court ruled that plaintiff's damages including lost wages and medical expenses would be limited to those incurred prior to January 7. From this judgment plaintiff took the present appeal.

The judgment in plaintiff's maintenance and cure action was rendered on the same factual allegations and between the same parties as in the present action. The prior judgment held that plaintiff reached maximum medical improvement on January 6, 1989 and that subsequent complaints of pain were not the result of his work related injury.

Collateral estoppel applies to admiralty proceedings. Pelotto v. L & N Towing Co., 604 F.2d 396 (5th Cir. 1979). Under the doctrine of collateral estoppel, this factual determination was conclusively established and cannot be relitigated by the same parties. Siders v. Ohio River Co., 351 F.Supp. 995 (W.D. PA 1972).

Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

BOBBY LEON ALEXANDER	*	No. 93-CA-1929
VERSUS	*	COURT OF APPEAL
SYSTEMS FUEL, INC.	*	FOURTH CIRCUIT
GENERAL MARINE TOWING		
MARINE TOWING COMPANY, ET AL	*	STATE OF LOUISIANA

* * * * * *

Armstrong, J. dissents with reasons

I respectfully dissent. The issue is whether, under the federal law of collateral estoppel, the findings as to the plaintiff's medical condition, made in connection with the judgment on his maintenance and cure claim, prevent him

from (1) introducing medical evidence in support of his claim for pain and suffering after January 6, 1989 and (2) introducing evidence of lost wages for after January 6, 1989? I believe not.

Under the federal law of collateral estoppel, under certain circumstances, a party to a prior action will be bound in a later action by a factual finding made in the prior action. However, the factual finding in the prior action will be given such collateral estoppel effect only if the factual finding was necessary to the determination of the prior to action. "Issue preclusion [i.e. collateral estoppel] attaches only to determinations that were necessary to support the judgment entered in the first action." 18 C.A. Wright, A.R. Miller and E.H. Cooper, Federal Practice and Procedure §4421 at 192 (1981), quoted in, Schiro v. Farley, 114 S.Ct. 783, '791 (1994). "Even though an issue was raised and fully litigated in a prior action, and a finding on the issue was made by a court preliminarily to rendition of judgment, the issue is not concluded by the judgment unless the finding made on the issue was, at least

alternatively, necessary to the judgment rendered. Thus an incidental or collateral determination of an issue that was not material in the prior action does not foreclose reconsideration of that issue in the later litigation in which the issue is material." 1 B J.W. Moore and J.D. Lucas, Moore's Federal Practice Para. 0.442 [5] (2d ed. 1995).

"Maintenance" is the payment of a modest amount per diem to a seaman while recovering from a work-related injury or illness and "cure" is the payment of medical expenses from that illness or injury. Both obligations of the employer terminate when the injured seaman has reached

"maximum medical recovery." The term "maximum medical recovery" does not necessarily mean that the seaman has returned to complete good health or even that the seaman is able to return to work. Instead, it means only that, "further treatment would not improve his condition." Alexander v. Systems Fuel, Inc., No. 93-CA-1929 (La. Appl. 4th Cir. Mar. 29, 1994) (unpublished) (at 6) (citing Huff v. Compass Nav., Inc., 522 So.2d 641, 646 (La. App. 4th Cir. 1988), writ den., 526 So.2d 797 (1988). See generally, Gaspard v. Taylor Diving and Salvage Co., Inc., 649 F.2d 372, 374 n.3 (5th Cir. 1981), cert denied, 455 U.S. 907 (1982); Lirette v. K & B Boat Rentals, Inc., 579 F.2d 968 (5th Cir. 1978); Springborn v. American Commercial Barge Lines, Inc., 767 F.2d 89 (5th Cir. 1985); Pelotto v. L & N Towing, 605 F.2d 396, (5th Cir. 1979).

Thus, all that was at issue in the maintenance and cure trial was the date at which the plaintiff had recovered from his injury as much as he was going to--i.e. the date at which further medical treatment was not going to further improve his condition. Whether the plaintiff had returned to full health, or was able to go back to work, was not at issue in that trial. Although it appears that the trial court's findings from the maintenance and cure trial went somewhat further, and the trial court seemed to find that the plaintiff's medical problems since January 6, 1989 were not the result of his work-related injury, that further finding was not necessary to the determination of the maintenance and cure claim.

Thus, there were no necessary factual findings in the maintenance and cure action that the plaintiff's work-related injury no longer affected his medical condition or his ability

to work after January 6, 1989. Consequently, federal collateral estoppel does not present the plaintiff from attempting to prove at the trial of his negligence and unseaworthiness claims that his work-related injury did affect his medical condition and/or his ability to work after January 6, 1989. I would hold that, in the negligence and unseaworthiness trial, the plaintiff may put on medical evidence as to his pain and suffering after January 6, 1989, and may put on evidence of his lost wages after January 6, 1989.

BOBBY LEON ALEXANDER	*	No. 93-CA-1929
VERSUS	*	COURT OF APPEAL
SYSTEMS FUEL, INC.	*	FOURTH CIRCUIT
GENERAL MARINE TOWING		
MARINE TOWING COMPANY,	*	STATE OF LOUISIANA
ET AL		

* * * * * *

WALTZER, J., DISSENTS FOR THE REASONS ASSIGNED BY J. ARMSTRONG

THE SUPREME COURT OF THE STATE OF LOUISIANA

BOBBY LEON ALEXANDER

VS. NO. 95-c-2857

SYSTEMS FUEL, INC., GENERAL

MARINE TOWING COMPANY ET AL

IN RE: Alexander, Bobby Leon; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Orleans Civil District Court Div. "B" Number 89-12824; to the Court of Appeal, Fourth Circuit, Number 94CA-2497

March 22, 1996

Granted. Judgment of the court of appeal is reversed. Collateral estoppel does not apply in this case. Case remanded to the district court for further proceedings.

WFM

PFC

JCW

CDK

BJJ

JPV

LEMMON, J. would grant and docket.

Supreme Court of Louisiana March 22, 1996 /s/ Clerk of Court For the Court

U.S.C. §1257 State Courts; certiorari.

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. §1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000.00, exclusive of interest and costs; and is between-

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000.00, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title-

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

46 U.S.C. §688. Recovery for injury to or death of seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

U.S. Constitution, Art. III §2

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;-between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

(3)

Supreme Court, U.S.
FILED
OCT 4 1996
CLERK

No. 96-411

In The

Supreme Court of the United States

October Term, 1995

SYSTEMS FUEL, INC., AND
GENERAL MARINE TOWING COMPANY, INC.,

Petitioners,

v.

BOBBY LEON ALEXANDER,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF IN OPPOSITION

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25 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

A. CORRECTION OF MISSTATEMENTS IN THE SYSTEM FUEL, INC., ET AL'S PETITION FOR WRIT OF CERTIORARI 4

FACTUAL BACKGROUND 7

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. The Petitioners' concern for "re-litigating" prior issues is unfounded; Plaintiff-Respondent's claims are not barred by Res Judicata or Collateral Estoppel 11

A. The Petitioners' concern for "re-litigating" prior issues is unfounded, because the Plaintiff-Respondent did not present claims for lost wages or pain and suffering at the trial for Maintenance and Cure 11

B. Respondent's claims for future wage loss and future pain and suffering are not barred by the doctrine of res judicata 13

II. The Louisiana Supreme Court was correct in reversing the appellate court, which erred by disallowing evidence of Mr. Alexander's future wage loss to be admitted at the trial of negligence and unseaworthiness 14

III. The Louisiana Supreme Court reversed the appellate court that erred by disallowing evidence of Mr. Alexander's medical treatment after January 6, 1989 for pain and suffering to be admitted at the trial of negligence and unseaworthiness 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES:

Brister v. A.W.I., Inc., 946 F.2d 350, *rehearing denied*, 949 F.2d 1160 (5th Cir. 1991) 19

Dart v. Ehret, 466 So.2d 1336 (La. Ct. App. 1985), *writ denied*, 468 So.2d 575 (1981) 5

Gaspard v. Taylor Diving and Salvage Co., 649 F.2d 372 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) 14

Green v. Industrial Helicopters, 593 So.2d 634 (La. 1992) 5

Lirette v. K&B Boat Rentals, 579 F.2d 960 (5th Cir. 1978) 15

Lowe v. Prejean, 540 So.2d 436 (La. App. 1st Cir. 1989) 13

Milstead v. Diamond M Offshore, Inc., 676 So.2d 89 (La. 1996) 5

McClean v. Smith, 593 So.2d 422 (La. App. 1st Cir. 1989) 13

Morris v. Fleniken, 473 So.2d 319 (La. App. 1st Cir. 1985) 13

Pacific Steamship Company v. Peterson, 278 U.S. 130 (1928) 19

Pelotto v. L&N Towing Co., 604 F.2d 396 (5th Cir. 1979) 15

Powell v. Offshore Navigation, Inc., 644 F.2d 1063 (5th Cir. 1981) 5

Schiro v. Farley, 114 S.Ct. 783 (1994) 20

TABLE OF AUTHORITIES – Continued

Page

Sims v. Industrial Commission, 10 Ariz.App 574, 460 P.2d 1003 (1969) 17

SJ v. PM, 586 So.2d 662 (La. Ct. App. 1991) 5

Sklar v. Sklar, 387 So.2d 1308 (La. Ct. App. 1980) 5

Springborn v. American Commercial Barge Lines, Inc. 767 F.2d 89 (5th Cir. 1985) 15

State v. Bolden, 639 So.2d 721 (La. 1994) 4

State v. Brooks, 541 So.2d 801 (La. 1989) 4

State v. Miller, 571 So.2d 603 (La. 1990) 4

Sun Finance Co. v. Jackson, 525 So.2d 532 (La. 1988) 14

Southern Pacific Company v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917) 5

Tate v. American Tugs, Inc., 633 F.2d 1129 (5th Cir. 1981) 19

Vicknair v. Hibernia Building Corp., 479 So.2d 904 (La. 1983) 5

STATUTES AND RULES:

LSA-R.S. 13:4231 13

Louisiana Code of Evidence art. 401-403 18

OTHERS:

1 B J.W. Moore and J.D. Lucas, *Moore's Federal Practice* Para. 0.443 [5] (2d ed. 1995) 3

18 C.A. Wright, A.R. Miller and E.H. Cooper, *Federal Practice and Procedure* section 4421 at 192 (1981) 20

STATEMENT OF THE CASE

Respondents respectfully oppose the petition for writ of certiorari. The petition assails the Louisiana Supreme Court for making holdings never in fact made, on issues never in fact presented to the Court.

On June 12, 1989, Respondent, Bobby Leon Alexander, brought suit against Systems Fuel and General Marine Towing for injuries sustained on December 22, 1988, while working for General Marine Towing. Plaintiff-Respondent then filed a Motion to sever the **maintenance and cure** claims, which was granted by the Court on October 16, 1992. Trial on the **maintenance and cure** claims was held on April 7, 1993, and, on June 4, 1993, Judge Robert Katz entered judgment dismissing the petition for **maintenance and cure**. The Louisiana Fourth Circuit Court of Appeal affirmed on March 29, 1994, in the matter entitled *Alexander v. Systems Fuel, Inc.*, 93-CA-1929 (La. App. 4th Cir. 1994). In its review, the Fourth Circuit held that "plaintiff reached Maximum Medical Recovery from the 1988 fall on January 6, 1989," after which defendant was no longer liable for plaintiff's **maintenance and cure**. Plaintiff did not appeal this ruling.

In a pretrial hearing on September 29, 1994, the trial court ruled that it would permit plaintiff to present evidence of past lost wages, but only from December 22, 1988 through January 6, 1989. The court also ruled that as to the issue of pain and suffering, it would permit plaintiff to present evidence of his pain and suffering, but that

plaintiff could not present evidence of medical treatment.[1]

In the "Reasons For Judgment," the court explained that its ruling was designed to avoid re-litigating the medical issues.[2] The trial court conceded that, although the Court found that maximum cure was reached by January 6, 1989,

> "it could very well be that the plaintiff continued to experience pain and suffering beyond this date. Hence, the plaintiff may put on evidence about his pain and suffering beyond January 6, 1989, but he may not put on additional medical testimony to this effect. Likewise, the plaintiff may put on evidence of loss wages through January 6, 1989, but may not provide any evidence of any lost wages beyond that time."[3]

It is from the September 29, 1994 judgment that plaintiff appealed to the Louisiana Fourth Circuit. The Louisiana Fourth Circuit affirmed the trial court's judgement that the plaintiff reached "maximum medical improvement" on January 6, 1989, but also incorrectly held that, under the doctrine of collateral estoppel, this factual determination precluded any claim for pain and suffering, or lost wages. It is only this ruling by the

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[1] Please see Petitioners' appendix 13a, Judgment On Rule to Define Issues/Res Judicata and Collateral Estoppel.

[2] Please see Petitioners' appendix 14a-16a, Civil District Court's Reasons For Judgment.

[3] *Id.* Petitioners' appendix 14a-16a, Civil District Court's Reasons For Judgment.

Fourth Circuit that the plaintiff appealed to the Louisiana Supreme Court.

In reversing the lower appellate court, the Louisiana Supreme Court apparently concluded that the lower court erred by ruling that it would not allow evidence of Mr. Alexander's future wage loss to be admitted at the trial of negligence and unseaworthiness. The Louisiana Supreme Court also apparently concluded that the lower court erred by ruling it would not allow evidence of Mr. Alexander's medical treatment for pain and suffering after January 6, 1989 to be admitted at the trial of negligence and unseaworthiness. The only reasonable conclusion is that the Supreme Court of Louisiana held that collateral estoppel was not applicable based on these given facts.

The Louisiana Supreme Court's holding was correct. The doctrine of collateral estoppel is not applicable *in this case*. The factual finding in the prior action will be given collateral estoppel effect *only* if the factual finding was *necessary* to the determination of the prior action. An incidental or collateral determination of an issue that was not material in the prior action does not foreclose reconsideration of that issue in the later litigation in which the issue is material. 1 B J.W. Moore and J.D. Lucas, *Moore's Federal Practice* Para. 0.443 [5] (2d ed. 1995).

In summary, *all* that was at issue in the **maintenance and cure** trial was the date at which the plaintiff had reached maximum medical recovery (the date at which further medical treatment was not going to further improve his condition). Maximum medical improvement does not encompass or preclude a plaintiff from asserting

a claim for pain and suffering and lost wages. Whether Bobby Alexander had returned to full health, or was able to go back to work, was not at issue in that trial. Federal collateral estoppel does not prevent the plaintiff from attempting to prove at the trial of his negligence and unseaworthiness claims that his work related injury did affect his medical condition and/or his ability to work after January 6, 1989. The conclusion of the Fourth Circuit was erroneous and therefore reversed by the Louisiana Supreme Court to prevent material harm to Bobby Alexander. On August 23, 1996, Systems Fuel, Inc. filed this petition for Writ of Certiorari.

A. Correction of Misstatements in the System Fuel, Inc., et al's Petition for Writ of Certiorari

Respondent herein addresses certain assertions made by Petitioners. First, Petitioners, in their *Question Presented*, framed the issue below in pertinent part: "Whether. . . . the need for Uniformity of Admiralty and Maritime Law demand that the Louisiana state courts, **which do not recognize the substantive doctrine of collateral estoppel**, apply Federal Maritime Law which does recognize said doctrine . . . " (emphasis added). Petitioners' statement in this regard is erroneous; the Louisiana state courts clearly recognize the principle of collateral estoppel. See *State v. Bolden*, 639 So.2d 721 (La. 1994), *State v. Miller*, 571 So.2d 603 (La.1990), *State v. Brooks*, 541 So.2d 801 (La. 1989).

Moreover, a recent decision by the Louisiana Supreme Court is in direct contrast to Petitioners' suggestion that Louisiana Courts ignore Federal Maritime Law,

including the **substantive** doctrine of collateral estoppel. In *Milstead v. Diamond M Offshore Inc.*, 676 So.2d 89 (La.1996), the Louisiana Supreme Court stated "Generally, state courts exercising concurrent maritime jurisdiction are bound to apply substantive federal maritime statutory law and to follow United Sates Supreme Court maritime jurisprudence. *Milstead v. Diamond M Offshore Inc.*, 676 So.2d 89 (La.1996) citing *Southern Pacific Company v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917); *Green v. Industrial Helicopters*, 593 So.2d 634 (La.1992), citing *Powell v. Offshore Navigation, Inc.*, 644 F.2d 1063, 1065 n.5 (5th Cir.1981). Thus it is apparent that Louisiana **does** recognize the characteristic features of general maritime law and that the decision of the Louisiana Supreme Court does not interfere with the proper harmony and uniformity of that law.

Additionally, the Petitioners' erroneous assertion that Louisiana does not recognize collateral estoppel is apparently based on Louisiana cases that are not maritime or admiralty in substance. Please see page 15 of Petitioners' writ where Petitioners cite *SJ v. PM*, 586 So.2d 662 (La. Ct. App. 1991), *Vicknair v. Hibernia Building Corp.*, 479 So.2d 904 (La.1983), *Dart v. Ehret*, 466 So.2d 1336 (La. Ct. App. 1985), *writ denied*, 468 So.2d 575 (1981), *Sklar v. Sklar*, 387 So.2d 1308 (La. Ct. App. 1980). These cases are not remotely maritime or admiralty in nature. Accordingly, the Petitioners' assertion that Louisiana State courts do not recognize collateral estoppel in admiralty and maritime law is unavailing.

Secondly, the Louisiana Supreme Court in its decision in this case held that collateral estoppel did not apply "to this case", evidently not because Louisiana

does not recognize collateral estoppel, but rather simply because an issue of ultimate fact which is the subject matter of this litigation had not been determined as set forth below.

To illustrate the Louisiana Supreme Court granted Respondent's writ of certiorari, unanimously reversing the Court of Appeal on the basis that: "Collateral estoppel does not apply *in this case.*" (Emphasis added). It should be apparent that the decision was not based on the principle that Louisiana does not recognize collateral estoppel, but rather on the grounds that whether the plaintiff had returned to full health, or was able to go back to work, was not at issue in that trial. Accordingly, federal collateral estoppel does not prevent the Respondent from attempting to prove at the trial of his negligence and unseaworthiness claims that his work-related injury did affect his medical condition and/or ability to work after January 6, 1989.

Finally, Petitioners, in their Statement of the Case, makes another inadvertent misstatement. On page six (6) in paragraph two Petitioners state " . . . the Supreme court of Louisiana reversed the Appellate Court ruling that collateral estoppel *did not* apply to admiralty proceedings." Again, the Louisiana Supreme Court did not ever state this as a principle of law. Petitioners' statement is clearly an incorrect quote. Petitioners repeat the above assertion in several different forms which for Respondent to address now would be repetitive.

FACTUAL BACKGROUND

On December 22, 1988, Mr. Alexander, a Jones Act Seaman, slipped while on board the M/V GLADYS R and fell approximately ten to fifteen feet onto a steel deck. Mr. Alexander was knocked unconscious as a result of striking the steel deck, and an ambulance transported Mr. Alexander to the Pendleton Memorial Hospital in New Orleans, Louisiana. Mr. Alexander remained at Pendleton Memorial for five (5) days due to the injuries resulting from a concussion as well as from severe neck and back trauma.

Mr. Alexander's employer sent him to Dr. Robert Cooper for his continued complaints of headaches and back pain. On January 6, 1989, only ten (10) days after Pendleton Memorial Hospital released Mr. Alexander, Dr. Cooper determined that Mr. Alexander could return to work because he had achieved maximum medical recovery. However, despite returning to work for a relatively short period of time, Mr. Alexander continued to experience headaches, back pain, and neck pain. He sought treatment from his family physician, Dr. John Smoot.

On April 20, 1989, Dr. John Smoot, a family practitioner in Batesville, Mississippi, examined Mr. Alexander, and detected muscle spasms in Mr. Alexander's legs and observed restricted motion in Mr. Alexander's back. As a result, Dr. Smoot advised Mr. Alexander to refrain from working for at least thirty days, and to see a neurosurgeon, Dr. John Frenz.

On April 25, 1989, Mr. Alexander was examined by Dr. John Frenz, a neurosurgeon practicing near Jackson, Mississippi. Dr. Frenz conducted a physical examination

of Mr. Alexander and made a preliminary diagnosis of chronic sprain and strain, ridiculopathy, possibly disk displacement, and nerve root compression. Dr. Frenz additionally recommended that Mr. Alexander be admitted to a hospital for additional diagnostic treatment.

As a result of Dr. Frenz's examinations, counsel for Mr. Alexander made demand on the defendants requesting that defendants reinstate Mr. Alexander's **maintenance and cure**. Defendants refused to reinstate **maintenance and cure** payments, and the parties litigated this issue at the maintenance and cure trial. While defendant's prevailed on the issue of Mr. Alexander's entitlement to **maintenance and cure**, the parties did not litigate, nor did the court rule on the issues of Mr. Alexander's entitlement to damages for his pain and suffering, or his lost wages.

SUMMARY OF ARGUMENT

This case presents legal issues that were correctly decided by the Louisiana Supreme Court. In this instance, the trial court incorrectly decided that Plaintiff-Respondent could not present, at the trial of negligence and unseaworthiness, any evidence of future wage loss, past wage loss, or medical testimony regarding Mr. Alexander's pain and suffering beyond the date of maximum medical recovery, January 6, 1989. In its Reasons for Judgment, the trial court conceded that such future pain and suffering may exist, but all medical evidence would be suppressed in the interest of avoiding a re-litigation of the medical issues. From this judgment, Respondent

herein appealed to the Louisiana Fourth Circuit Court of Appeal which in a 3-2 decision upheld the trial court. The Louisiana Supreme Court unanimously reversed the Louisiana Fourth Circuit Court of Appeal.

I.

The Petitioners' concern for re-litigating prior issues is not applicable here, because the Plaintiff-Respondent did not present claims for lost wages or pain and suffering at the trial for **maintenance and cure**. Plaintiff-Respondent's claims for future wage loss and future pain and suffering are not barred by the doctrine of collateral estoppel, because the issues of wages and pain and suffering were not elements of any of the damages claimed in the **maintenance and cure** trial.

II.

The Louisiana Supreme Court was correct in its ruling. That ruling, in effect, permits Mr. Alexander to present evidence of his future loss of earning capacity and past wage loss at the trial of negligence and unseaworthiness. Mr. Alexander's claims in the trial for **maintenance and cure** did not address Plaintiff-Respondent's claims of lost wages after January 6, 1989, nor did it address claims for pain and suffering. Moreover, the trial court's decision inconsistently recognized Plaintiff-Respondent's claim for future pain and suffering and his claim for wages lost as a result of that pain and suffering, but inexplicably denied Respondent the opportunity to present all relevant evidence to support those claims.

III.

The lower court expressly recognized the validity of Plaintiff-Respondent's claim for future pain and suffering, but it erred when it refused to allow evidence of Mr. Alexander's medical treatment for such pain and suffering. The inconsistency of that ruling cannot be justified by the legal doctrines of res judicata or collateral estoppel, nor is it justified as a simple matter of fairness. The Trial Court's judgment, which suppressed all *medical evidence* that plaintiff seeks to introduce in support of future pain and suffering, wholly without legal foundation, and obviously prejudices the claimant's rights to present all relevant evidence in support of his case. The Louisiana Supreme court agreed.

IV.

Respondent asserts that the Louisiana Supreme Court was correct in its application and/or interpretation of the principles of Maritime law. Louisiana state courts clearly recognize collateral estoppel and do apply it consistently and uniformly in maritime cases; however, the facts of the instant case do not warrant the application of collateral estoppel. Accordingly, this Honorable Court should affirm the decision of the Louisiana Supreme Court.

ARGUMENT

In its September 29, 1994 "Reasons For Judgment," the trial court explained that the ruling was designed to

avoid re-litigating the medical issues. The court found that

> Maximum cure was reached by January 6, 1989, but that it could very well be that the plaintiff continued to experience pain and suffering beyond this date. Hence, the plaintiff may put on evidence about his pain and suffering beyond January 6, 1989, but he may not put on additional medical testimony to this effect. Likewise, the plaintiff may put on evidence of loss wages through January 6, 1989, but may not provide any evidence of any lost wages beyond that time.[4]

Respondent contends that the Petitioners' position is legally erroneous, conceptually illogical, and unduly burdensome to the Respondent's interests.

I. The Petitioners' concern for "re-litigating" prior issues is unfounded; Plaintiff-Respondent's claims are not barred by Res Judicata or Collateral Estoppel.

A. The Petitioners' concern for "re-litigating" prior issues is unfounded, because the Plaintiff-Respondent did not present claims for lost wages or pain and suffering at the trial for Maintenance and Cure.

The issues set forth in the **Maintenance and Cure** trial were presented for the sole purpose of making the

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[4] Please see Petitioners' appendix 14a-16a, District Court's Reasons For Judgment.

Jones Act Employer responsible for Respondent's Maintenance and certain medical bills. At no time during that proceeding were lost wages, pain and suffering, or any other potential damages at issue. The contract at issue in the **maintenance and cure** trial was the date at which the plaintiff had reached maximum medical recovery (i.e. the date at which further medical treatment would not further improve Mr. Alexander's condition), and whether Bobby Alexander was entitled to **maintenance and cure**. Whether Bobby Alexander had returned to full health, whether he was able to go back to work, whether he was experiencing pain and suffering were not issues in that trial. Federal collateral estoppel does not prevent the plaintiff from attempting to prove at the trial of his negligence and unseaworthiness claims that his work related injury did affect his medical condition and/or his ability to work after January 6, 1989. There simply were no necessary factual findings in the **maintenance and cure** action that Bobby Alexander's work related injury no longer affected his medical condition or his ability to work after January 6, 1989. Accordingly collateral estoppel cannot be applied to preclude plaintiff from litigating this very critical issue.

Respondent has conceded that the Judgment regarding the severed **Maintenance and Cure** issues precluded further pursuit of his claim for Maintenance (the Maritime equivalent of Workers' Compensation) and his claim for Cure (the employer's obligation to pay medical bills). Again, because the issue of **Maintenance and Cure** was severed from the remainder of the Jones Act claims, Plaintiff-Respondent maintains his right to pursue his

remedies for future lost wages and future pain and suffering.

Here, Respondent's maintenance claim, the maritime equivalent to worker's compensation, should not bar his remaining negligence claims for future lost wages and pain and suffering.

B. Respondent's claims for future wage loss and future pain and suffering are not barred by the doctrine of res judicata.

The doctrine of res judicata, as it existed at all times pertinent hereto, is set forth in the former LSA-R.S. 13:4231[5] as follows:

> The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

The absence of any one of the requisite elements is fatal to the claim of Res Judicata (*McClean v. Smith*, 593 So.2d 422, 424 (La. App. 1st Cir. 1989). *See also Morris v. Fleniken*, 473 So.2d 319, 320 (La. App. 1st Cir. 1985).), and the party urging the exception of res judicata has the burden of proving each essential element. *Lowe v. Prejean*, 540 So.2d 436, 438 (La. App. 1st Cir. 1989). If any doubt exists as to

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[5] The doctrine of res judicata was changed by Acts 1990, No. 521, effective January 1, 1991, for all civil actions filed on or after that date.

the application of the doctrine of res judicata the exception must be denied. *Id* at 437.

In the instant case, the missing element is the "thing" demanded: future wage loss and future pain and suffering. The issues of wages and pain and suffering were not elements of damages in the **Maintenance and Cure** trial. Accordingly, the Petitioners' rights and remedies to pursue future lost wages and future pain and suffering are not affected by the principle of res judicata. *See Sun Finance Co. v. Jackson*, 525 So.2d 532 (La. 1988).

II. The Louisiana Supreme Court was correct in reversing the appellate court, which erred by disallowing evidence of Mr. Alexander's future wage loss to be admitted at the trial of negligence and unseaworthiness.

The appellate court's decision, which was corrected by the Louisiana Supreme Court, reflected an erroneous presumption that the date of "maximum medical improvement", January 6, 1989, automatically bars any recovery of wage loss after that date. The dismissal of the **maintenance and cure** claims and any determination regarding maximum medical recovery have no bearing on Respondent's claims for lost wages or pain and suffering. **Maintenance and cure** requires the Jones Act employer to pay the seaman's equivalent of Workers' Compensation and medical expenses up to the point of "maximum medical improvement." *See Gaspard v. Taylor Diving and Salvage Co.*, 649 F.2d 372 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). "Maximum medical improvement" is simply the point at which the Jones Act employer is no longer obligated to pay **maintenance and cure**, the seaman's

equivalent to workers' compensation. *Lirette v. K&B Boat Rentals*, 579 F.2d 960, 969 (5th Cir. 1978). *See also Springborn v. American Commercial Barge Lines, Inc.*, 767 F.2d 89 (5th Cir. 1985).

The date of "maximum medical improvement", which signifies the termination point of an employer's maintenance and cure obligation, does not preclude claims for future wage loss. To illustrate, an injured person who is not at Maximum Medical Improvement may very well be able to earn 100% of his/her wages at the time of injury, for example an attorney, accountant, secretary, etc., who has suffered a severe knee injury. Conversely, a manual laborer with the very same knee injury may never again have the capacity to earn his/her pre-injury wages, even years after having reached Maximum Medical Improvement.

Further, the fact that Respondent may have reached "maximum medical improvement" in no way establishes that his condition permits him to return to full employment, nor does it mean that he does not continue to experience pain and suffering. *See Springborn v. American Commercial Barge Lines, Inc.*, 767 F.2d 89 (5th Cir. 1985); *Pelotto v. L&N Towing Co.*, 604 F.2d 396 (5th Cir. 1979). Even the trial court recognized this distinction in its "Reasons For Judgment," stating that "it could very well be that the plaintiff continued to experience pain and suffering beyond this date."[6]

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[6] Please see Petitioners' appendix 14a-16a, Civil District Court's Reasons For Judgment.

The court correctly recognized that "maximum medical improvement" does not preclude claims of future pain and suffering beyond this date. By the same reasoning, the lower court, as the Louisiana Supreme Court did, should have recognized that maximum recovery does not preclude past or future wage loss. While "it could very well be that the plaintiff continued to experience pain and suffering beyond this date," it could also "very well be that" any pain and suffering beyond this date could have an impact on earning potential and future wage loss. It is factually and conceptually inconsistent to concede that future pain and suffering may exist while barring any attempt to recover for future wage loss resulting from any such pain and suffering.

Finally, the date of maximum recovery cannot preclude a determination of future wage loss, because the **maintenance and cure** analysis considers any factors that are distinct from those which establish wage loss. **Maintenance and Cure** is the employer's obligation to pay benefits to a seaman (maintenance) and medical bills (cure) and is terminated at the point of maximum medical recovery. It is a simple determination which does not consider any possible impact on past or future wage loss. Economic loss, on the other hand, is based upon a detailed economic analysis which takes into account the employee's work history, age, amount of impairment, relevant economic conditions and medical condition. "Maximum medical improvement" is not an element or even a factor in wage loss determination. The term "earning capacity" refers to capability of worker to sell his labor or services in any market reasonably accessible to

him, taking into consideration his general physical functional impairment resulting from his accident, any previous disability, his occupation, age, at time of injury, nature of injury and his wages prior to and after the injury. *Sims v. Industrial Commission*, 460 P.2d 1003, 1006. The entitlement to lost wages or earning capacity does not terminate at "maximum medical improvement." **Maintenance and cure** cannot preclude future wage loss, because, factually, legally, and conceptually, future wage loss embodies distinct issues and requires a separate determination. *See Id.* Accordingly, the issue would not be re-litigated, thus collateral estoppel (issue preclusion) is inapplicable.

III. The Louisiana Supreme Court reversed the appellate court that erred by disallowing evidence of Mr. Alexander's medical treatment after January 6, 1989 for pain and suffering to be admitted at the trial of negligence and unseaworthiness.

As previously noted, the trial court in its "Reasons For Judgment" conceded that "it could very well be that the plaintiff continued to experience pain and suffering beyond this date."[7] The ruling itself allows Respondent to introduce evidence of future pain and suffering, but rejects any evidence of medical treatment for such pain and suffering beyond January 6, 1989.[8] Evidently the Supreme Court determined that this ruling is unfounded

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[7] Please see Petitioners' appendix 14a-16a, Civil District Court's Reasons For Judgment.

[8] Please see Petitioners' appendix 13a, Judgment On Rule to Define Issues/Res Judicata and Collateral Estoppel.

and prejudicial to the Respondent's claim. Clearly, medical testimony is both relevant and essential to a showing of pain and suffering.

Respondent further contends that there is no credible reason for the exclusion of medical evidence showing future pain and suffering. Any such medical evidence cannot be barred by the doctrine of collateral estoppel, since, first, the trial for **Maintenance and Cure** did not address the issues of future pain and suffering,[9] second, the trial court conceded that Respondent was, in fact, free to pursue these claims.[10]

Finally, under the Louisiana Code of Evidence, Articles 401-403, the evidence of medical treatment after January 6, 1989 should be admissible at trial, since it is wholly relevant to Respondent's claim for future pain and suffering, which was already deemed admissible by the trial court.[11] Under Louisiana Code of Evidence, Article 403, there is no evidence to show that the probative value of any such medical testimony would be outweighed by a danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or waste of time.

The trial court has expressly recognized Plaintiff-Respondent's right to assert his claim for future pain and

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[9] Please see Petitioners' appendix 13a, Judgment On Rule to Define Issues/Res Judicata and Collateral Estoppel.

[10] Please see Petitioners' appendix 14a-16a, Civil District Court's Reasons For Judgment.

[11] Please see Petitioners' appendix 14a-16a, Civil District Court's Reasons For Judgment.

suffering. Petitioners' interpretation would clearly undermine Respondent's claim by refusing to allow any and all relevant medical evidence, without any apparent justification. Accordingly, the lower court was correctly reversed by the Louisiana Supreme Court. From that reversal Petitioners lodged the present application for writ of certiorari.

CONCLUSION

The General Maritime law permits severance of **Maintenance and Cure** claims from the main claim and permits a hearing on an expedited basis. *See Tate v. American Tugs, Inc.*, 633 F.2d 1129, 1131 (5th Cir. 1981); *Pacific Steamship Company v. Peterson*, 278 U.S. 130 (1928). The precise rationale for this principle is that such a procedure enables the injured seaman to obtain relief in the nature of regular compensation for subsistence (i.e., Maintenance) and payment of medical bills (i.e., Cure) so that the seaman is not without medical treatment. The seaman's claim for **maintenance and cure** is based on the employer's "contractual obligation" to the seaman and involves an entirely separate element of damages. *See Brister v. A.W.I., Inc.*, 946 F.2d 350, *rehearing denied*, 949 F.2d 1160 (5th Cir. 1991).

The trial court erroneously ruled to suppress Mr. Alexander's evidence of future wage loss and all evidence of his medical treatment after January 6, 1989, relevant to his claims for future pain and suffering. The appellate court erroneously affirmed that such evidence should be barred in order to avoid a re-litigation of these

issues. On a writ of certiorari to the Louisiana Supreme Court the, Respondent herein, asserted and the Louisiana Supreme Court agreed that these issues have neither been litigated nor resolved. Hence, the conclusion of the Fourth Circuit was reversed by the Louisiana Supreme Court to prevent material harm to Bobby Alexander. As a result, the Respondent will be permitted to introduce medical evidence in support of his pain and suffering as well as evidence of lost wages subsequent to January 6, 1989.

Clearly Petitioners' suggestion to this Honorable Court that the Louisiana state courts do not recognize the substantive doctrine of collateral estoppel is clearly a misrepresentation. The Supreme Court of Louisiana simply determined collateral estoppel inapplicable in the instant case. Under the federal law of collateral estoppel, in certain circumstances, a party to a prior action will be bound in a later action by a factual finding made in the prior action. However, the factual finding in the prior action will be given collateral estoppel effect only if the factual finding was *necessary* to the determination of the prior action. "Issue preclusion [i.e., collateral estoppel] attaches only to determinations that were necessary to support the judgment entered in the first action." 18 C.A. Wright, A.R. Miller and E.H. Cooper, *Federal Practice and Procedure* section 4421 at 192 (1981), *quoted in Schiro v. Farley*, 114 S.Ct. 783, at 791 (1994).

All that was at issue in the **maintenance and cure** trial was the date at which the plaintiff had recovered from his injury as much as he was going to – i.e., the date at which further medical treatment was not going to further improve his condition. Whether the plaintiff had

returned to full health, or was able to go back to work, was not at issue in that trial.

Thus, there were no necessary factual findings in the **maintenance and cure** action that the Respondent's work-related injury no longer affected his medical condition or his ability to work after January 6, 1989. Accordingly, federal collateral estoppel does not prevent the Respondent from attempting to prove at the trial of his negligence and unseaworthiness claims that his work-related injury did affect his medical condition and/or ability to work after January 6, 1989. Accordingly, the ruling of the Louisiana Supreme Court was not contrary to the doctrine of collateral estoppel. Consequently, a review on writ of certiorari is not warranted.

Respectfully submitted,

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Supreme Court, U.S.
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No. 96-411

In The

Supreme Court of the United States

October Term, 1996

SYSTEMS FUEL, INC. and GENERAL MARINE TOWING COMPANY, INC.,

Petitioners,

v.

BOBBY LEON ALEXANDER,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana State Supreme Court

REPLY BRIEF

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10 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

Correction of Misstatements in Respondent's Brief In Opposition 1

Factual Background 1

TABLE OF AUTHORITIES

Page

Milstead v. Diamond M Offshore, Inc., 676 So.2d 89 (La. 1996) 5

State v. Bolden, 639 So.2d 721 (La. 1994) 5

State v. Brooks, 541 So.2d 801 (La. 1989) 5

State v. Knowles, 392 So.2d 651 (La. 1981) 5

State v. Miller, 571 So.2d 603 (La. 1990) 5

STATUTES AND RULES:

Article 905.8, La.C.Cr.P 5

28 U.S.C. §1331(1) 7

REPLY BRIEF OF PETITIONER

CORRECTION OF MISSTATEMENTS IN RESPONDENT'S BRIEF IN OPPOSITION

Petitioners take issue with Respondent's interpretation of the Louisiana Supreme Court's opinion in which the Court stated, in its entirety: "Judgment of the Court of Appeals is reversed. Collateral estoppel does not apply in this case. Case remanded to the district court for further proceedings."

FACTUAL BACKGROUND

Respondent, in relating the factual background, conveniently forgot to include several very important factual findings and misstate others:

(1) Not only had Respondent reached maximum medical recovery on January 6, 1989, he had also fully recovered according to the testimony of his physician, Dr. Robert Cooper. See *Louisiana Fourth Circuit Court of Appeals Opinion,* Petition for Writ of Certiorari, p. 11a.

(2) Not only did Respondent return to work for 75 days over a three month period, but he also never suffered any headaches, back or neck pains until he injured himself at home in late April of 1989. See *Louisiana Fourth Circuit Court of Appeals Opinion,* Petition for Writ of Certiorari, p. 19a.

(3) The medical treatment and bills of Dr. John Smoot and Dr. John Frenz were not connected to any work-related injury, but were the result of the injury Plaintiff sustained at his home in late April of 1989. See

Louisiana Fourth Circuit Court of Appeals Opinion, Petition for Writ of Certiorari, p. 19a.

Respondent illogically argues the substantive facts which have already been proved and incorrectly states that the Louisiana Fourth Circuit Court of Appeals' opinion dated September 29, 1994, precluded his claim for pain and suffering and lost wages. While the trial court allowed Respondent to put on proof of pain and suffering, it refused his request to offer medical testimony from Dr. John Smoot and Dr. John Frenz who treated Respondent after he had fully recovered from any work-related injury.

While the trial court allowed Respondent to put on evidence of past wage loss, it ordered that he could not offer evidence after January 7, 1989, the date he returned to full employment. Further, the trial court found that Respondent had worked at full employment for over three months prior to sustaining his injury at home, one which was totally unrelated to his work-related injury. At the time that Respondent sustained his injury at home, it had been factually determined and decided that he had fully recovered and was not suffering from any disability, pain and suffering, or any other damages resulting from his work-related injury.

Petitioners contend that it is completely absurd for a court to find that Respondent had fully recovered from his work-related injury on January 6, 1989; had worked 75 days at hard manual labor as a deckhand with no complaints or physical problems; had sustained an injury to his back while at home; had sought immediate medical treatment from Dr. John Smoot and subsequent treatment

from Dr. John Frenz; that subsequent to his injury at home, all medical treatment, disability and other damages resulted from that accident at home and not from his work-related accident; and then hold that the treatment from Dr. Smoot and Dr. Frenz would be admissible to show pain and suffering from his work-related injury.

Also Petitioners claim that the same reasoning applies to allowing Respondent to offer evidence that he has sustained a wage loss arising out of his work-related injury when the proof is that he lost no wages after January 6, 1989 as a result of that work-related injury.

The Louisiana Fourth Circuit Court of Appeals' opinion which the Louisiana Supreme Court subsequently reversed noted the following operative facts:

(1) Respondent was treated for the injuries he sustained in the accident and reached maximum medical improvement on January 6, 1989.

(2) All medical bills and benefits for maintenance and cure were paid through that date.

(3) He returned to work on January 7, 1989 and worked for the next three months without problems or complaints.

(4) In April, 1989, he injured his back at home.

(5) All subsequent medical treatment, disability, and other damages resulted from this accident at home.

The above operative facts are not contested and were all necessary determinations since the Respondent put at issue his medical bills and his demand for maintenance

from January 7, 1989 through the date of the maintenance and cure trial, April 7, 1993.

In affirming the trial court's opinion, the Louisiana Fourth Circuit Court of Appeals stated in the last paragraph of its opinion that "[c]ollateral estoppel applies to admiralty proceedings. (citation omitted) Under the doctrine of collateral estoppel, this factual determination was conclusively established and cannot be re-litigated by the same parties." (citation omitted)

Petitioners contend that the argument proposed by the Respondent that he should be able to put on evidence of future lost wages is irrational and illogical when the Louisiana courts have previously determined that all of his post-January 6, 1989 medical treatment, disability, and other damages sustained by the Respondent resulted from the accident he sustained at home and not from any work-related accident.

While Petitioners concede that the Louisiana Supreme Court did not specifically state that collateral estoppel does not apply to admiralty proceedings, the only reasonable explanation or interpretation of the Louisiana Supreme Court's twenty-six-word opinion is that collateral estoppel is not recognized in admiralty proceedings filed, pursuant to the savings-to-suitors clause, in the courts of the State of Louisiana.

The sole issue for this Court's determination is whether or not the Louisiana State Supreme Court recognizes the substantive doctrine of collateral estoppel as it applies to admiralty cases. The cases cited by Respondent for the proposition that Louisiana recognizes the doctrine of collateral estoppel are ones focusing on criminal law

and are clearly distinguishable from the facts in the case at bar. *State v. Bolden,* 639 So.2d 721 (La. 1994) and *State v. Brooks,* 541 So.2d 801 (La. 1989) deal with the United States Constitution's Fifth Amendment guarantee against double jeopardy.

Also, in *State v. Miller,* 571 So.2d 603 (La. 1990) the Louisiana Supreme Court held that the doctrine of collateral estoppel was not applicable and applied Article 905.8, La.C.Cr.P. concerning imposition of sentence. Also, the Louisiana Supreme Court in *State v. Brooks, supra,* cited *State v. Knowles,* 392 So.2d 651 (La. 1981) in its discussion concerning collateral estoppel. The *Knowles* case is primarily a double jeopardy case and the common law issues of collateral estoppel did not apply.

Respondent also argues that the decision in *Milstead v. Diamond M Offshore, Inc.,* 676 So.2d 89 (La. 1996) is applicable for the propositions that Louisiana law recognizes the characteristic features of general maritime law and that decisions of the Louisiana Supreme Court do not interfere with the proper harmony and uniformity of maritime law. However, the *Milstead* decision was rendered on July 2, 1996, approximately four months after the Louisiana Supreme Court's decision rendered in the instant case. It should also be noted that *Milstead* did not address collateral estoppel issues, but spoke to the standard for appellate review.

It could be argued that the decision in the *Milstead* case overruled the decision rendered by the Louisiana Supreme Court in the case at bar. Then, the highest court of the State of Louisiana would have provided this Court with another basis to reverse summarily the Louisiana

Supreme Court and to hold that collateral estoppel does apply in the instant case and that its application precludes the Respondent from both proceeding with his wage loss claim after January 6, 1989, when he returned to full employment with no restrictions nor complaints, and putting on the medical testimony of Dr. Smoot and Frenz who treated him for injuries that he sustained at home and which were not connected in any way to his work-related accident.

A review of Louisiana Court cases still fails to uncover any Louisiana State Court decision which applied the doctrine of collateral estoppel in an admiralty proceeding.

Respondent further argues that the doctrine of res judicata does not bar his claims for future wage loss and future pain and suffering. This case has never been one involving the doctrine of res judicata, but has always addressed the doctrine of collateral estoppel.

Respondent's argument that he should be allowed to offer evidence of his medical treatment after January 6, 1989 through Drs. Smoot and Frenz on the issue of his pain and suffering at the trial of negligence and unseaworthiness points out the absurdity of his entire response to the Petition.

The Respondent erred in assuming that the Supreme Court of Louisiana's reversal on the grounds that collateral estoppel did not apply in a bifurcated Jones Act/ General Maritime Law context, was, in effect, a substantive law ruling that the trial court's order was unfounded and prejudicial. Respondent admits that "clearly, medical

testimony is both relevant and essential to a showing of pain and suffering." *Brief in Opposition*, pp. 17-18.

But, the real question is, "How relevant and essential to a showing of pain and suffering is evidence of medical treatment that has previously been determined to be the result of an accident totally unrelated to the one at issue?"

The scenario in the case at bar illustrates why the doctrine of collateral estoppel is followed in maritime matters. For this Court to deny this Petition and allow the Louisiana Supreme Court's decision to stand would severally damage the uniformity of the general maritime law as it is applied in cases filed in the courts of the several states pursuant to the savings-to-suitors clause of 28 U.S.C. §1331(1).

Respectfully submitted,

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